



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIF

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Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Services and Facilities of Southern California Edison Company and San Diego Gas and Electric Company Associated with the San Onofre Nuclear Generating Station Units 2 and 3.

Investigation 12-10-013
(Filed October 25, 2012)

And Related Matters.

Application 13-01-016
Application 13-03-005
Application 13-03-013
Application 13-03-014

**JOINT RULING OF ASSIGNED COMMISSIONER AND ASSIGNED
ADMINISTRATIVE LAW JUDGE DIRECTING PARTIES TO PROVIDE
ADDITIONAL RECOMMENDATIONS FOR FURTHER PROCEDURAL ACTION
AND SUBSTANTIVE MODIFICATIONS TO DECISION 14-11-040**

Summary

This Ruling directs Southern California Edison Company (Edison or SCE) and San Diego Gas & Electric Company (SDG&E) (collectively the Utilities) to meet and confer with other parties to this proceeding to further consider and provide additional recommendations regarding the issues set forth in the Joint Ruling of Assigned Commissioner and Administrative Law Judge Reopening Record, Imposing *Ex Parte* Contact Ban, Consolidating Advice Letters, and Setting Briefing Schedule issued by Assigned Commissioner Sandoval and Administrative Law Judge (ALJ) Maribeth Bushey on May 9, 2016 (May 9th Ruling). The meet and confer sessions shall be held in accordance with Commission Rules of Practice and Procedure 12.6 and shall be treated as confidential. The May 9th Ruling reopened the record to review the 2014

Settlement Agreement adopted in Decision (D.) 14-10-040 (Settlement or Agreement) against the California Public Utilities Commission (the Commission) standards for approving settlements as set forth in Rule 12.1(d) of the Commission's Rules of Practice and Procedure,¹ in light of the Commission's decision on December 3, 2015, D.15-12-006, fining Edison \$16.74 million in penalties for failing to disclose *ex parte* communications relevant to this proceeding.

The May 9th Ruling directed the parties to prepare their best assessment of whether in light of information about *ex parte* contacts disclosed after the Commission's November 2014 adoption of D.14-10-040, the Settlement is reasonable in light of the record, consistent with the law, and in the public interest.² The parties were specifically directed to file and serve Initial and Reply Briefs assessing whether the Settlement meets the Commission's standard for approving such agreements under Rule 12.1(d) and to provide clear and logical factual and legal support for the filer's assessment of the Settlement. The parties were further directed to include proposed remedies consistent with the Commission's authority and recommendations for further procedural actions.³

This ruling requires the parties to meet and confer to further address the standards for approving settlements as set forth in Rule 12.1(d) and to explore additional procedural actions for the Commission to consider in issuing its decision on the pending petitions for modification (PFM) of D.14-11-040.⁴

¹ Unless otherwise noted all references to Rules refer to the California Public Utilities Commission Rules of Practice and Procedure.

² May 9, 2016 Joint Ruling at 5.

³ May 9, 2016 Joint Ruling at 8.

⁴ The meet and confer sessions directed through this ruling are to occur in accordance with Rule 12.6 and shall be deemed confidential party settlement discussions. Nothing in this ruling prevents the parties or a sub-set of parties from holding additional meet and confer sessions to

1. Background

Pursuant to Public Utilities Code § 455.5⁵, the Commission issued an Order Instituting Investigation (OII) on October 25, 2012, initiating a multi-part investigation into the actions and expenses of the Utilities⁶ associated with the extended outage at San Onofre Nuclear Generating Station (SONGS). The scope of the investigation included the causes of the outages, the Utilities' responses, the future of the SONGS units, and the resulting effects on the provision of safe and reliable electric service at just and reasonable rates.⁷ The OII identified rate recovery issues including: (1) review of all post-2011 Operations & Maintenance (O&M) costs and capital spending; (2) costs of scheduled Request for Offers (RFO) and emergent activities; (3) removal of non-useful generation assets from rate base; and (4) various questions around the costs, viability, and prudence of the Steam Generator Replacement Program (SGRP) approved in D.05-12-040.

The Utilities were ordered to separately record all SONGS-related expenses, beginning as of January 1, 2012, into a SONGS outage memorandum account (SONGSOMA),⁸ subject to refund, and report the expenses to the

further address the issues presented. All such meetings shall be deemed confidential consistent with Rule 12.6.

⁵ All section references are to California Public Utilities Code unless otherwise specified.

⁶ For purposes of this ruling, the reference to "Utilities" refers to both Edison [referred to herein as Edison or SCE for Southern California Edison] and SDG&E.

⁷ OII at 21.

⁸ I.12-10-013 at 10-13 and OP 4. The SONGSOMA is different than Edison's SONGS Memorandum Account (SONGSMA) authorized by D.12-11-051 and SDG&E's SONGS Balancing Account (SONGSBA) created by D.06-11-026 and most recently reauthorized by D.13-05-010.

Commission on a regular basis.⁹ The Commission later confirmed the order in the decision on each utility's General Rate Case (GRC) application.¹⁰

Within the OII, the Commission stated its intention to consolidate other future proceedings to encompass review of the full range of post-outage costs and activities.¹¹ Subsequently, the Utilities each filed applications for reasonableness review of 2012 recorded O&M, non-O&M costs, and capital spending,¹² for approval of the totality of the SGRP costs,¹³ and for power purchased during 2012, including replacement of power lost due to the outages.¹⁴ In these applications, the Utilities sought full recovery in rates for all of the identified expenses.

The Utilities served Opening Testimony on December 5, 2012, in response to the broad scope of the OII. On December 12, 2012, the ALJ ordered the Utilities to provide supplemental testimony, *inter alia*, regarding SONGS: outage history, historic forecast and actual expenses, 2012 treatment of fuel contracts, reasonableness support for 2012 recorded expenses, calculation of replacement power costs, support for meeting a reasonable or prudent manager standard post-outage, and for production of reports from the Nuclear Regulatory Commission (NRC) and others addressing the cause of the outage. Other parties had an opportunity to serve reply testimony, and the Utilities were permitted to serve rebuttal.

⁹ Edison reports to the Commission monthly on its SONGSOMA and SDG&E reports on its SONGSOMA quarterly.

¹⁰ D.12-11-051 at Findings of Fact (FOF) 366, Conclusions of Law (COL) 21-22, OP 9, 10 (SCE); D.13-05-010 at FOF 19, COL 7, 8 (SDG&E).

¹¹ OII at 8-9.

¹² A.13-01-016 (Edison), A.13-03-013 (SDG&E).

¹³ A.13-03-005 (Edison), A.13-03-014 (SDG&E).

¹⁴ A.13-04-001 (Edison), A.13-03-013 (SDG&E).

A prehearing conference (PHC) was held on January 12, 2013. Due to the potentially wide scope and quantity of information necessary for review, the assigned Commissioner and ALJ determined that to promote efficient administration of the OII, it would be divided into several phases, each with its own PHC and Scoping Memo. Among the expected benefits of this approach were: (i) resolving the hold-over 2012-2014 revenue requirement first; (ii) building a chronological record of 2012 activities to inform the second phase determination of whether to remove some or all of SONGS plant from rate base; (iii) pacing for certain information not yet known (*e.g.*, pending NRC actions, Mitsubishi Heavy Industries (MHI) arbitration, insurance claims); and (iv) consistent decisions between phases.

On January 28, 2013, then assigned Commissioner Michel Peter Florio and ALJ Melanie M. Darling¹⁵ issued a Phase 1 scoping memo (Phase 1 Scoping Memo) that set dates for parties to serve testimony, established dates for evidentiary hearings, and defined the scope of inquiry. In Phase 1, the Commission focused on the Utilities' applications¹⁶ for review of 2012 expenses recorded in the SONGS memorandum accounts, including an assessment of the reasonableness of Edison's actions and expenditures following the Unit 3 steam generator leak. On May 3, 2013, the ALJs created a sub-phase, Phase 1A, to develop a method for calculating 2012 costs of replacement power.

Several parties participated in Phase 1 and Phase 1A by submitting testimony, conducting cross-examination of witnesses, and/or filing post-hearing briefs. In addition to the Utilities, these parties are Office of Ratepayer

¹⁵ On May 1, 2013, ALJ Kevin Dudney was co-assigned to the OII.

¹⁶ These proceedings were consolidated with the OII in an April 19, 2013 ALJ ruling.

Advocates¹⁷ (ORA), The Utility Reform Network (TURN), Alliance for Nuclear Responsibility (A4NR), World Business Academy (WBA), Women's Energy Matters (WEM), Joint Parties (comprised of National Asian American Coalition, Ecumenical Center for Black Church Studies, Latino Business Chamber of Greater Los Angeles and Chinese American Institute for Empowerment), Ruth Henricks (Henricks), Friends of the Earth (FOE), Coalition of California Utility Employees (CCUE), and the Coalition to Decommission San Onofre (CDSO).¹⁸ Henricks and other parties filed several, primarily procedural, motions during the Phase 1 period, none of which altered the course of the OII set forth in the Scoping Memo, except to clarify that ordinary review of power purchases by both Utilities would continue to occur in their respective Energy Resource Recovery Account (ERRA) proceedings.

On February 21, 2013, the ALJ ordered Edison to file its SGRP application by March 15, 2013, and to provide supplemental testimony regarding interim collection of SGRP costs in rates, calculation of the SGRP revenue requirement, and to explain some aspects of Edison's first SONGSMA report. Other parties had an opportunity to serve reply testimony, and the Utilities were permitted to serve rebuttal testimony. On April 30, 2013, the ALJs ordered Edison to collect and summarize relevant cost data which appeared throughout their testimony, and to create a chronology of key operational facts and decisions related to the

¹⁷ Formerly known as Division of Ratepayer Advocates (DRA) and filed as such during these proceedings.

¹⁸ Other entities which were granted party status in the OII and participated at some point are: California Attorney General, California Large Energy Consumers Association (CLECA) Direct Access Customer Coalition jointly with the Alliance for Retail Energy Markets (DACC/AReM). Several other parties did not participate in these proceedings.

outage. Even though no new information was to be included in the reorganized Edison exhibit, other parties had an opportunity to submit rebuttal exhibits.¹⁹

On March 11, 2013, FOE and World Business Academy filed a motion for expedited consideration of Phase 3 issues, including consideration of the cause of damage to the steam generator tubes and allocation of responsibility for that damage. The ALJ issued a ruling on April 19, 2013, denying the Motion as premature.²⁰ On March 29, 2013, interveners submitted testimony in the Phase 1 portion of this proceeding in response to Phase 1 issues 1 and 4.²¹ On April 2, 2013, Edison filed a motion to strike the majority of interveners' testimony. On May 10, 2013, the assigned ALJ issued an email ruling granting the majority of Edison's motion. The intervenor testimony was deferred to Phase 3 through the May 10, 2013 ruling. The Phase 1 Scoping Memo listed Phase 3 as the forum to discuss the SGRP reasonableness review.

Evidentiary hearings in Phase 1 were held from May 13 to 17, 2013. Opening and Reply Briefs were filed by Edison, SDG&E, ORA, TURN, A4NR, WBA, CDSO, Joint Parties and WEM on June 28, 2013, and July 9, 2013, respectively. Evidentiary hearings in Phase 1A were held on August 5 and

¹⁹ The ruling merely ordered a more coherent presentation of previously served, and revised, cost data, not any new information. However, some corrections were made on the record to the proffered exhibit, SCE-10.

²⁰ April 19, 2013 Administrative Law Judge Ruling on Various Motions and Consolidation of Proceeding at 8-9.

²¹ Phase 1 Scoping Ruling at 3-4

...the Commission will address the following :

1. Nature and effects of the steam generator failures in order to assess the reasonableness of SCE's consequential actions and expenditures (e.g., was it reasonable to remove fuel from unit #3)...
4. Other issues as necessary to determine whether SCE should refund any rates preliminary authorized in the 2012 GRC, in light of the changed facts and circumstances of the unit outage; and if so, when the refunds should occur.

6, 2013. Opening Briefs were filed on August 29, 2013, by Edison, SDG&E, ORA, and A4NR. Phase 1A Reply Briefs were filed by Edison, SDG&E, TURN, A4NR, ORA, and WEM.

In addition, the ALJs sought input about the OII issues from the public during 2013. They held four public participation hearings regarding the SONGS outages: two in Costa Mesa on February 21, 2013, and two in San Diego on October 1, 2013.

A proposed decision (PD) for Phase 1 was published for comment on November 19, 2013. Opening Comments were filed on December 9, 2013, by WEM, CDSO, Joint Parties, Edison, TURN, Coalition of California Utility Employees (CCUE), SDG&E, WBA, and A4NR. Reply Comments were filed on December 16, 2013, by Edison, SDG&E, TURN, ORA, Joint Parties, WBA, and A4NR.²² The Phase 1 PD was not voted on by the Commission as it was ultimately withdrawn and the Settlement was approved through adoption of D.14-11-040.

Regarding Phase 2, the ALJs ordered the Utilities to provide testimony by July 22, 2013, that provided an accounting of the assets and amounts currently in rate base for the entire SONGS facility. The ruling also required each utility to make a proposal for which assets should be removed from rate base, and related monthly O&M costs, as of November 1, 2012, and other dates as preferred.

A PHC for Phase 2 occurred on July 12, 2013. The Phase 2 Scoping Memo focused on the value of SONGS assets in rate base at different points in time,

²² On January 14, 2014, four Commissioners (Peevey, Florio, Sandoval, and Peterman) participated in a noticed all-party meeting to discuss the PD.

which of these assets and associated costs should be removed from rate base, and the ratemaking treatment for removed assets and costs.²³

Phase 2 evidentiary hearings were held October 7 to 11, 2013. Phase 2 Opening Briefs were filed and served on November 22, 2013, by Edison, SDG&E, ORA, TURN, A4NR, WBA, CDSO, WEM, and Henricks.²⁴ Reply Briefs were filed and served on December 13, 2013, by Edison, SDG&E, ORA, TURN, ANR, WBA, CDSO, and DACC/AReM. A PD for Phase 2 was not published for comment.

On March 20, 2014, Edison, SDG&E, TURN, and ORA served a notice of settlement conference to be held on March 27, 2014. On April 3, 2014, Edison, SDG&E, TURN, ORA, FOE, and CCUE (collectively, Settling Parties) filed and served a Joint Motion for Adoption of Settlement (Joint Motion). Settling Parties asserted the proposed Agreement, if approved, “would resolve all issues in the OII and consolidated proceedings.”²⁵ A4NR, Henricks, and WEM opposed the settlement.

On April 24, 2014, the ALJs issued a ruling that: (1) ordered Settling Parties to post documents supporting or clarifying the Agreement on Edison’s SONGS discovery website; (2) ordered Settling Parties to serve supporting testimony by May 1, 2014 to provide clarifying information, and support for certain numbers referenced in the Agreement in response to questions posed by the ALJs in the ruling; (3) scheduled and set the agenda for an evidentiary hearing pursuant to Rule 12.3 to hear material contested issues of fact asserted in

²³ Assigned Commissioner and Administrative Law Judges’ Ruling Determining Phase 2 Scope and Schedule (July 31, 2013).

²⁴ WBA (on November 22) and CDSO (on November 27) filed and served “corrected” Phase 2 opening briefs; all references to WBA’s and CDSO’s opening briefs in this decision refer to these corrected briefs.

²⁵ Joint Motion at 1.

the Agreement; and (4) scheduled and set the agenda for a community information meeting near SONGS on June 16, 2014.²⁶ Settling Parties, jointly and separately, timely served the supplemental testimony.

On May 7, 2014 (or earlier), comments on the Joint Motion were filed by WBA, CDSO, Joint Parties, A4NR, CCUE, CLECA, DACC/AReM, WEM, and Henricks.²⁷ On May 14, 2014, the ALJs conducted the evidentiary hearing, took submission of the supplemental testimony, heard sworn oral testimony from Settling Parties and permitted cross-examination of the Settling Parties' witnesses by non-settling parties.²⁸ On May 22, 2014, Reply Comments on the Joint Motion were filed by Henricks, Joint Parties, Settling Parties, Edison, CDSO, SDG&E, A4NR, and WEM.

On September 5, 2014, the assigned Commissioner and the ALJs issued a Ruling Requesting the Settling Parties to Adopt Modifications (Modification Ruling) to the proposed Settlement Agreement. The request was based on a preliminary assessment, which identified a few provisions that needed to be clarified or modified to meet the public interest even when considered as part of the whole settlement package. This ruling also included information about the Greenhouse Gas (GHG) research and reduction program that was the subject of a late-filed *ex parte* between then President Peevey and the University of California. The Settling Parties disputed the view that the identified provisions were not in the public interest; however, they voluntarily accepted the requests and amended and restated the Agreement to accomplish the Commission's

²⁶ Commissioners Peevey, Florio, and Picker attended the scheduled Community Information Meeting on June 16, 2014 as observers.

²⁷ Henricks filed an "Objection" which the Commission's Docket Office characterized as "comments."

²⁸ Commissioners Peevey and Florio attended the hearing as observers.

public interest objective.²⁹ Several non-settling parties filed comments ten days later confirming their continued opposition to the settlement as amended. On September 24, 2014, the Settling Parties filed and served an “Amended and Restated Settlement Agreement”, which included the requested modifications. This proceeding was submitted on September 24, 2014.

On November 25, 2014, the Commission issued D.14-11-040, which approved a Settlement Agreement among Edison, SDG&E, ORA, TURN, FOE and CCUE. The Agreement resolved all issues in the OII which included an investigation into the SONGS shutdown as well as the Commission’s deferred general rate reviews of 2012 SONGS-related expenses for each utility³⁰ and the reasonableness review of each utility’s recorded costs for replacing four steam generators at SONGS.³¹

On February 9, 2015, Edison late-filed a Notice of *Ex Parte* Communication regarding a meeting that occurred on or about March 26, 2013 between Edison’s then-Executive Vice President Stephen Pickett and the Commission’s then President, Peevey, at an industry conference in Warsaw, Poland regarding ratemaking treatment for SONGS post-shutdown costs. The notes taken during this meeting (the Bristol Notes) provided by Edison in the supplemental notice of late *ex parte* communications appear to propose a framework for a potential settlement of the SONGS OII.³²

²⁹ Joint Settling Parties Comments on Modification Ruling.

³⁰ Application 13-01-016 (Edison).

³¹ Application 13-03-005; The replacement of the four steam generators was approved by the Commission in Decision 05-12-040 which ordered a reasonableness review of the Utilities’ expenses related to the replacement project after completion.

³² On April 10, 2015. Harvey Morris, an Assistant General Counsel in the Commission’s Legal Division, served a copy of the attached notes by email to a number of individuals, including the service list in this proceeding. Edison then filed a supplement to its February 9, 2015 late filed

On August 5, 2015, based on Edison's admissions, the then-assigned ALJ ruled that Edison committed ten separate violations of Rule 8.4 by failing to report oral and written communications between Edison and Commission decision makers which met the definition of *ex parte* communication as set forth in the Commission's Rules. The ruling also ordered Edison to show cause why it should not be held in contempt of the Commission and sanctioned for ten violations of Rule 8.4 as well as Rule 1.1, the Commission's Ethics Rule.

A4NR on April 27, 2015, as amended on May 26, 2015, and ORA on August 11, 2015, both filed Petitions for Modification of D.14-11-040 alleging that had Edison properly and timely filed the *ex parte* notices, the terms of the Settlement Agreement would have been more favorable to ratepayers. On June 24, 2015, TURN filed its response to A4NR's Petition for Modification. TURN's response described the issues created by the series of events recounted above and argued that the "recent revelations of extensive private conversations and deal making between Edison and then President Peevey create the public perception that the settlement process was fundamentally and irreparably tainted and drove outcomes that are unfair to ratepayers. . . . and that the most direct way to restore public confidence on these matters is to reopen the proceeding and determine the allocation of SONGS-related costs without any possible involvement by then President Peevey and based exclusively on testimony, evidentiary hearings and briefs."³³

On December 8, 2015, the Commission issued D.15-12-016 which affirmed eight violations of Rule 8.4 of the Commission's Rules by Edison stemming from

ex parte Communication with the Bristol Notes attached. A copy of the handwritten notes is attached to this Ruling as Attachment A.

³³ TURN Response June 24, 2015 at 2-4.

its failure to report, before or after, *ex parte* communications which occurred between Edison and a Commissioner. D.15-12-016 also found that Edison twice violated Rule 1.1, the Commission's Ethics Rule, as a result of the acts and omissions of Edison and its employees, which misled the Commission, showed disrespect for the Commission's Rules, and undermined public confidence in the agency. The Commission imposed a fine of \$16,740,000 for the violations, and ordered Edison to create and maintain a website tracking all non-public individual communications related to these consolidated proceedings by Edison representatives with Commissioners, their advisors, or other Commission decision makers.

On December 15, 2015, after the issuance of D.15-12-016, the University of California at Los Angeles (UCLA) filed a late *ex parte* notice regarding the Greenhouse Gas (GHG) Research and Reduction program. The reported communications lasted over a series of several weeks and commenced in May of 2014 between representatives of UCLA representatives and then President Peevey.³⁴

On May 9, 2016, the assigned Commissioner and assigned ALJ issued a ruling reopening the record and set a briefing schedule.³⁵ In response to the May 9th Ruling, the Utilities filed an implementation summary on June 2, 2016. Parties filed opening briefs on July 7 and Reply Briefs on July 21, 2016. We summarize the parties' positions, below.

³⁴ University of California, Los Angeles' Late Filed Notice of *Ex Parte* Communication dated December 15, 2015.

³⁵ For a more detailed summary of the background information in this proceeding please see D.14-11-040, D.15-12-016, and the May 9th Ruling.

2. Summary of Party Positions

2.1 Settling Parties

The following parties entered into the Agreement adopted in D.14-11-040: Utilities, TURN, ORA, FOE, and CCUE. At the time the Settling Parties filed their Joint Motion to adopt the Agreement the Settling Parties stated that the Settlement was: “a product of substantial negotiation efforts on behalf of the Utilities, TURN and ORA, and the success of those efforts is largely attributable to the magnitude of information and depth of analysis set forth in the record.” The Settling Parties also stated, “the negotiated outcomes in the Agreement are within the range of positions and outcomes proposed by the Settling Parties in their prepared testimony and briefing on Phases 1, 1A, and 2”, and “[t]he recoveries and disallowances set forth in the Agreement represent compromises on issues that were thoroughly litigated by the Utilities, TURN, and ORA in these three Phases.”

In their joint motion requesting the Commission to adopt the Agreement, the Settling Parties asserted, “the Agreement represents a fair resolution of the Settling Parties’ litigation positions” and “the Agreement represents a genuine compromise between the litigation positions set forth by the Utilities, on the one hand, and TURN and ORA, on the other hand.” The Settling Parties also asserted that “[i]t is important to note that the Settling Parties include both Utilities; two of the most prominent ratepayer advocate groups in Commission practice (ORA and TURN); a global network of environmental activists (FOE); and a labor group that represents hundreds of SONGS employees affected by the events giving rise to this OII.” The decision approving the revised Settlement noted the importance of having a broad coalition of interests represented as Settling Parties.

TURN and ORA have now renounced their support for the Settlement, as adopted in D.14-10-040, given the revelations of the unreported *ex parte* contacts between Edison and then President Peevey.

2.1.1 Southern California Edison Company

Edison continues to support the Settlement as adopted in D.14-11-040 regarding allocation of costs associated with the failed SGRP and resulting closure of SONGS. Edison asserts that the Settlement continues to be reasonable, lawful, and in the public interest. Edison recommends that the Commission close the record in Investigation (I.) 12-10-013 and issue a decision finding that the Settlement complies with Rule 12.1(d). Edison further recommends that the Commission “conclude (1) D.14-11-040 should not be modified, (2) the Settlement should remain in effect and continued to be implemented, and (3) the Settling Parties’ obligations under sections 5.1 and 5.8 of the Settlement should resume.” Regarding the GHG Reduction Research program, Edison recognizes the Commission’s discretion to determine whether to maintain or strike that provision. Edison further recommends that the Commission deny A4NR’s and ORA’s petitions for modification and the Application for Rehearing filed by Henricks and the CDSO.

2.1.2 San Diego Gas & Electric Company

SDG&E maintains a position aligned with Edison, in that it continues to assert that the Settlement remains reasonable in light of the record, consistent with the law, and in the public interest. SDG&E asserts that the Settlement allowed for the avoidance of protracted litigation with unclear results. SDG&E asserts that the Settlement delivers fair benefits to ratepayers in a timely fashion, and rescinding D.14-11-040 would undo these benefits and result in a time consuming and costly process for the Commission and all parties to the

proceeding without any certainty as to the outcome of the process. SDG&E also recognizes the Commission's discretion to determine whether the GHG Reduction Research program should remain in place.

2.1.3 The Utility Reform Network

TURN takes "the position that the adopted settlement should be set aside due to the pervasive *ex parte* violations involving repeated unreported communications between then president Michael Peevey and executives from [Edison]." TURN believes that had timely disclosure of the *ex parte* communications occurred, it would have materially impacted its position in both settlement negotiations and litigation.³⁶ TURN recommends that the Commission resolve the proceeding through issuance of proposed decisions based on the litigation positions of the parties for Phases 1 and 2 relying on the existing record with a reasonableness review of the SGRP litigated in a new Phase 3. As an alternative, TURN recommends the Commission should "instead consider a series of adjustments to the adopted settlement that will protect ratepayers and promote the public interest."³⁷ These adjustments include disallowance of some or all of the \$2.17 billion in base plant; refund Replacement Steam Generators (RSGs) costs collected from ratepayers in 2010 and 2011; approve an additional \$86.95 million in refunds that would have been ordered under the Phase 1 PD; and eliminate the GHG research contribution and refund these amounts to ratepayers. As another alternative, TURN states that "[i]f the Commission does not wish to set aside the settlement, TURN urges the

³⁶ See TURN Opening Brief filed July 7, 2016 at 7.

³⁷ The specific modifications recommended by TURN are discussed below.

Commission to exercise its authority under Rule 12.4(c) and propose alternative terms that the Settling Parties can choose to accept or reject.”³⁸

2.1.4 Office of Ratepayer Advocates

ORA argues that Edison’s failure to report *ex parte* contacts with Commission decision-makers adversely impacted the settlement discussions. ORA asserts that this adverse impact to the settlement discussions requires remedies beyond the punitive measures enacted in D.15-12-016. ORA states “information has value, as does unequal access to decision-makers. [Edison]’s withholding of *ex parte* information conferred an unfair advantage.” ORA proposes that the Commission order Edison to refund \$383 million³⁹. ORA believes this amount would compensate ratepayers for the quantifiable loss of ORA’s litigation position. ORA also proposes that the Commission order an additional bill credit to SDG&E and Edison ratepayers, in proportion to those companies’ respective contributions in the amount of \$25 million in lieu of the \$25 million contribution to UC for the GHG Research and Reduction Program required by the Agreement. ORA recommends an additional refund total of \$408 million to ratepayers.

ORA argues that “[m]itigating the impact of Edison’s *ex parte* violations on ratepayers is ultimately at the core of ORA’s proposed remedy.” ORA cites the Commission’s authority to “do all things necessary and convenient in the

³⁸ See TURN Reply Brief filed July 21, 2016 at 2.

³⁹ ORA’s litigation position pre-settlement was Present Value Revenue Requirement (PVRR) of \$1.861 billion (after adjusting for the NEIL settlement amount credited back to ratepayers) subtracted from the Agreement projected yield PVRR of \$2.244 billion (after adjusting for NEIL settlement amount credited back to ratepayers), equaling \$383 million. ORA stated it “believes that the additional appropriate amount that should flow from Edison to ratepayers should be at least \$648 million, the difference between the settlement amount and ORA’s initial litigation position prior to the state of settlement negotiations.” In response to the May 9th Ruling, ORA adjusted the amount of its requested remedy to \$383 million to account for the NEIL settlement funds credited to ratepayers. ORA PFM, dated August 11, 2015 at 2.

exercise of its power and jurisdiction over utilities” under PU Code § 701 in arguing that the Commission “has the authority to make ratepayers whole and refund the quantifiable loss of \$383 million.” ORA notes that the United States Supreme Court has observed that: “[t]he power to reform contracts (as contrasted with the power to enforce contracts as written) is a traditional power of an equity court, not a court of law, and was used to prevent fraud.” ORA argues for use of the Commission’s equitable power to order refunds of the foregone litigation position due to the undisclosed *ex parte* communications, rather than arguing that the Commission should order the settling parties to return to the bargaining table and propose a new settlement, or resume litigation of the OII.⁴⁰

2.1.5 Friends of the Earth

FOE supports the position of the Utilities. FOE continues to support the Agreement and requests that the Commission find the Agreement continues to be “reasonable in light of the whole record of the proceeding, is consistent with the law and was, is and remains in the public interest.”

2.1.6 Coalition of California Utility Employees

CCUE takes the position that the Agreement was and remains within the reasonable range of outcomes for the proceeding. CCUE also states that the Agreement was reasonable in light of the record at the time it signed “[t]he Settlement Agreement, consistent with the law, and in the public interest with respect to utility employees.”

⁴⁰ ORA Opening Brief July 7, 2016 at 9, citing *Cigna Corp. v. Amara*, 563 U.S. 421, 440 (2011).

2.2 Non-Settling Parties

2.2.1 Parties Not Opposed to the Settlement Agreement

World Business Academy (WBA), Joint Parties (comprised of National Asian American Coalition, Ecumenical Center for Black Church Studies, Latino Business Chamber of Greater Los Angeles and Chinese American Institute for Empowerment), CLECA, and Direct Access Customer Coalition jointly with the Alliance for Retail Energy Markets (DACC/ AReM) Parties who were active in the proceeding have not filed either opening briefs or reply briefs in response to the May 9th Ruling. We note that at the time of consideration of D.14-10-040, several non-settling parties supported the settlement; we draw no conclusion from their lack of participation at this time.

2.2.2 Parties Opposed to the Settlement Agreement

2.2.2.1 Alliance for Nuclear Responsibility

A4NR asserts that the Settlement fails the test required by Rule 12.1(d) based on new facts neither available to the parties during settlement negotiations, nor available to the Commission when it adopted D.14-11-040. A4NR asserts the Settlement is no longer reasonable in light of the Rule 12.1(d) standards as Edison's actions have tainted the record, amount to fraud, and cannot be in the public interest. A4NR "urges the Commission to utilize the rarely invoked rescission authority of Cal. Pub. Util. Code § 1708."⁴¹ A4NR recommends that the Commission 1) reinstate the PD for Phases 1 and 1A; 2) prepare and issue a PD for Phase 2; and 3) convene a Phase 3 PHC to determine how to proceed with the remainder of the proceeding.

⁴¹ Cal Pub. Util. Code § 1708 states, "The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision."

2.2.2.2 Women's Energy Matters

WEM supports the PFM filed by A4NR to reopen the SONGs OII proceeding and litigate all phases. WEM emphasized that it maintains its opposition to the settlement and argues that “(t)he only reasonable settlement of this Investigation is for ratepayers to pay only the costs for replacement energy during the period February 1, 2012 to plant shutdown in June 2013.”⁴²

2.2.2.3 Coalition for Decommissioning San Onofre and Ruth Henricks

CDSO jointly filed with Henricks an Application for Rehearing on December 18, 2014, arguing that the Settlement fails the Commission's standards under Rule 12.1. CDSO and Hendricks urge a resumption of litigation of the SONGs OII, including a completion of all three phases.

They assert that the Commission failed to allow investigation or hearing into whether Edison was imprudent in obtaining and deploying the defective steam generators. They also argue that Edison failed to demonstrate the rates allowed under the Agreement are just and reasonable.⁴³

2.2.2.4 California State University

California State University (CSU) challenges the \$25 million allocation to UCLA for the GHG research and reduction program. CSU asserts that Edison's failure to timely disclose *ex parte* communications about the GHG program unfairly disadvantaged CSU. CSU believes a 50 percent/50 percent allocation of the \$25 million program funds between the UCLA and CSU would be fair and in the public interest, but says it is not asking the Commission to decide that issue.

⁴² WEM Brief in Response to May 9 Ruling, at 3.

⁴³ CDSO/Henricks Application for Rehearing December 18, 2014 at 11. Also see Henricks' Brief in Response to Joint Ruling Reopening Record: Settlement Agreement Does Not Meet Commission Standards, Nor Standards of Due Process, For Approving Settlements at 9

Instead, CSU recommends the Commission order SCE and SDG&E to meet and confer with both universities regarding the allocation of program funding between UCLA and CSU, including the possible exploration of a competitive bid process that could be adopted and order the Utilities to submit a report on the outcome of their consultations by a date certain.⁴⁴

3. Implementation of the Settlement to Date

The May 9th Ruling directed Edison to file and serve a Summary of Settlement, including a status report on implementation of the Settlement, specify and quantify all accounting and ratemaking actions taken to date, planned actions for 2016, and planned actions required for future years. Edison filed its response with the Commission on June 2, 2016. SDG&E also filed a response the same day summarizing its implementation of the Agreement to date. Edison described the Settlement as having three broad categories:

1) the Utilities are barred from recovering any costs for the SGRP starting February 1, 2012 the day after the outages occurred resulting in a disallowance of \$597 million for Edison with a PVRR loss resulting from disallowance in the amount of \$696 million⁴⁵; 2) ratepayers to pay the costs of power purchased by the Utilities as “replacement power” - costs of power purchased to replace the lost output from SONGS⁴⁶; and 3) the Settlement allows the Utilities to recover its remaining SONGS costs, other than the costs of the failed RSGs.⁴⁷

⁴⁴ CSU Brief July 15, 2016 at 3.

⁴⁵ Edison was prohibited from collecting rates both in investment balance as well as any return on that investment. See Edison Response June 2, 2016 at 7.

⁴⁶ See Edison Response at 8. At the time the Commission approved the Agreement the replacement power costs were estimated at \$389 million for market costs of energy and capacity from February 1, 2012 through June 30, 2013 (SCE-56 row 6 (Replacement Power)). The Commission had deferred, prior to adopting the Agreement, a decision in the Energy Resource Recovery Account (“ERRA”) proceeding on the recovery of \$462 million of costs that the Commission deemed to represent the market costs of the SONGS outages in 2013 covering a

Edison reports that it “has reduced rates, refunded, or will refund nearly \$1.6 billion under the Settlement.”⁴⁸ Edison reports that this rate reduction is significantly larger than estimated at the time the Settlement was adopted. The increase in the rate reduction is attributed to a number of recoveries from third parties and other cost offsets that were not included in the estimates prepared when the Settlement was approved. Edison acknowledges that some of these recoveries and offsets do not result directly from the Settlement. However, Edison notes that these reductions will reduce the amount its customers will pay in future rates for SONGS-related costs. Edison also notes that the increased recoveries do not include other sources of funds, such as potential recoveries from the MHI arbitration and future sales of its nuclear fuel inventory, which may further reduce customer rates in the future.⁴⁹

The Agreement as adopted estimated customer contributions covering approximately \$3.285 million of the \$4.733 billion sought by the Utilities in this proceeding.⁵⁰ Edison’s Response to the May 9th Ruling estimates that its \$3.285 million or 70% customer contribution for SONGS expenses has been reduced to \$2.036 billion or 55 percent of the total costs at issue in this proceeding.⁵¹ Edison summarizes these additional rate reductions in Table 1 of

different time period and includes different costs (foregone sales) than the February 1, 2012, through June 1, 2013 period replacement power costs of \$389 million addressed in SCE-56.

⁴⁷ See Edison Response at 8-9. These other costs include recovery of Edison’s capital investments in SONGs, along with associated O&M costs through 2013. The Settlement also imposes a reduced rate of return on the remaining investment in SONGS from 7.9% to 2.62%. D.14-11-040 at 2-3 estimates this reduced rate of return saves customers \$420 million over the ten-year amortization period.

⁴⁸ Edison Response at 10.

⁴⁹ Edison Response at 10.

⁵⁰ TURN Opening Brief dated July 7, 2016 at 3; D.14-11-040 at 33.

⁵¹ TURN Opening Brief dated July 7, 2016 at 3; Edison Response at 13.

its June 2, 2016 Response to the May 9th Ruling.⁵² The reductions to Edison ratepayers as of April 30, 2016 include: 1) \$506 million in refund for February 1, 2012 – December 31, 2014; 2) \$429 million reduction in SONGS revenue requirement for 2015; 3) \$282 million credit from the nuclear decommissioning trust (NDT); 4) \$293 million NEIL settlement net proceeds (95% to ratepayers and 5% to Utilities); and 5) \$72 million from Department of Energy settlement net proceeds.⁵³ The summary also listed a charge to ratepayers in the amount of \$12 million for other SONGS Settlement proceeds and expenditures. The total rate reduction reported by Edison, excluding recovery of replacement power costs, as of April 30, 2016 was \$1.570 billion.⁵⁴

SDG&E filed a separate response to the May 9th Ruling. In its response, SDG&E states that the Agreement provided for collection of \$746.5 million from SDG&E customers, which is approximately \$293.4 million less than the initial \$1.0399 that it sought in this proceeding.⁵⁵ As of April 30, 2016, SDG&E reports that ratepayers received benefits in the form of rate reductions totaling \$424.5 million. These reductions include: 1) \$152.3 million refund for February 1, 2012-December 31, 2014; 2) \$140.5 million for the 2015 SONGS revenue requirement; 3) \$58.3 million credited from the nuclear decommissioning trust; and 4) \$76.2 million from NEIL and MHI settlement proceeds. SDG&E also reports a charge to ratepayers of \$2.8 million for other SONGS Agreement proceeds and expenditures.⁵⁶

⁵² Edison Response at 10 and 13.

⁵³ Edison Response Table 1 at 10.

⁵⁴ Edison Response at 9-15.

⁵⁵ SDG&E Response dated June 2, 2016 at 5.

⁵⁶ Items included in the “other SONGS Agreement proceeds” include: 1) a Property tax true-up of \$2.6 million and O&M true-up of \$2.5 million offset by M&S sales of \$4 million; and 2) non-

TURN, ORA, A4NR, WEM, Henricks, and CDSO argue the Utilities' presentation of "benefits" that "are in fact, even better than what was originally anticipated at settlement implementation" are illusory at best.⁵⁷ A4NR points out several benefits referenced in the Utilities' responses would have occurred regardless of the Settlement. A4NR asserts that the NEIL settlement funds would have been returned to ratepayers regardless of the Settlement as ratepayers paid for the insurance settlement and the replacement power. A4NR further asserts that to allow the Utilities to keep this recovery would create an unjust and unreasonable windfall to the Utilities.⁵⁸ A4NR also points out the withdrawals from the ratepayer-funded nuclear decommissioning trust transfer funds from one ratepayer funded account to credit ratepayers through another account. "These withdrawals were for bona fide decommissioning costs or not, something entirely independent from approval of the settlement."⁵⁹ ANR also argues that recovery of spent fuel storage costs from the U.S. Department of Energy cannot be attributed to the Settlement. A4NR contends that the Utilities (like other nuclear power plant operators across the country) would have pursued the reimbursements regardless of the Settlement.⁶⁰

While recognizing the ratepayer benefits resulting from the Agreement, TURN raises several arguments countering the Utilities' position as to whether the benefits to ratepayers would have increased as a result of a litigated outcome

O&M property liability insurance of \$1.6 million and other adjustments of \$.3 million. SDG&E Response dated June 2, 2016 at 48.

⁵⁷ The Utilities note that that some of these recoveries and offset do not result directly from the settlement, however these additional funds will reduce the amount their customers will pay in future rates. See Edison Response at 10.

⁵⁸ See A4NR Reply Brief, July 21, 2016 at 13-14.

⁵⁹ See A4NR Reply Brief, July 21, 2016 at 14.

⁶⁰ See A4NR Reply Brief, July 21, 2016 at 14

or fully informed negotiations.⁶¹ TURN argues the Utilities' "comparison does not take into account the litigation positions of other parties which would increase the range of potential outcomes."⁶² TURN argues that because Phase 3 was outside the scope of the issues permitted to be litigated, its position did not take into account any imprudence that may have been attributed to Edison had Phase 3 been litigated.⁶³ TURN asserts had Edison been found imprudent it is probable that Edison would have had to bear a much larger portion of the costs, including the entire SGRP costs.⁶⁴

ORA disagrees with Edison's assertion that the Settlement provides the best outcome possible, and that the undisclosed information had no bearing on the settlement negotiations. ORA states it "disagrees with the Utilities' assertion that D.15-12-016 is a complete 'remedy' in response to [Edison]'s actions."⁶⁵ ORA points out the penalty levied against Edison was paid to California's General Fund, and not as refunds to Edison and SDG&E ratepayers. ORA believes despite the benefits achieved through the Settlement, if it had knowledge of the *ex parte* contacts it would have sought a more aggressive position that would have improved the terms of the Settlement in favor of ratepayers. ORA recommends "that an adjustment of \$383 million be adopted by the Commission to be refunded by SCE to ratepayers, in order to make ratepayers whole, for the harm perpetrated by SCE in this case."⁶⁶ Therefore ORA asserts the Utilities should refund ratepayers this additional amount plus

⁶¹ See TURN Reply Brief July 21, 2016 at 7-10.

⁶² See TURN Reply Brief July 21, 2016 at 7.

⁶³ Id.

⁶⁴ Id.

⁶⁵ See ORA Reply Brief July 21, 2016 at 1.

⁶⁶ ORA Brief, at 3.

the \$25 million earmarked as a contribution to the UC for the GHG research program.⁶⁷

Henricks and CDSO argue the Settlement leaves ratepayers paying the majority of the costs for the failed SGRP and other costs associated with the failed SONGS facility to the amount of \$3.3 billion. Henricks asserts without a reasonableness review of Edison's actions there is no way to determine whether rates ordered in the proceeding are just and reasonable.⁶⁸

4. Commission Policy Favoring Settlements

As noted in D.14-11-040, the Commission has expressed a strong policy favoring settlement of disputes so long as the settlement is fair and reasonable in light of the whole record, is consistent with the law, and is in the public interest.⁶⁹ The Commission policy favoring settlements supports many beneficial goals, including the reduction of litigation expenses, the conservation of limited resources, and the reduction of risk to the parties that litigation will produce unacceptable results.⁷⁰

The settlement process allows for conservation of public and private resources, particularly given the complex nature of rate cases. Settlements can expedite and streamline the process for information gathering. Formal litigation often fosters extreme posturing by the parties, slowing down the process with added complexity.

⁶⁷ ORA Opening Brief July 7, 2016 at 9-10; ORA Reply Brief July 21, 2016 at 3.

⁶⁸ Henricks Opening Brief at 9.

⁶⁹ D.14-11-040, citing D.88-12-83 (30 CPUC 2d 189, 221-223); D.91-05-029 (40 CPUC 2d 301, 326); D.05-03-022, at 8; Also see Rule 12.1(d).

⁷⁰ See D.92-07-076, 45 CPUC 2d 158, 166; D.92-12-019, 46 CPUC 2d 538, 553.

In order to ensure that the settlement process is a fair⁷¹ and effective way of resolving complex matters, all parties must comply with the Commission adopted settlement procedures and standards. These procedures and standards include: 1) the Commission must independently assess whether the settlement meets the criteria set forth in Rule 12.1 (d) (reasonable in light of the whole record, consistent with the law, and in the public interest); 2) comparison of the possible outcomes of the case if it had been litigated;⁷² and 3) the range of interests represented by the settling parties.⁷³

The Commission carefully considers the range of interests represented by the settling parties. The parties to any settlement must represent a broad range of interests and a settlement must demonstrate that compromises reached fall within a reasonable range of the parties' litigation positions.⁷⁴ In order to adequately make these determinations the parties proposing settlement must comply with Commission Rules: Rule 12 and Rule 8. This is particularly important when parties to a settlement bring decision-makers into the discussion.

Pursuant to California Public Utilities code § 1701.1 (C) the Commission has adopted a very specific set of *ex parte* rules to safeguard parties in proceedings.⁷⁵ These rules apply to all ratemaking proceedings whether the

⁷¹ This is particularly important where the settlement is contested.

⁷² Rule 12.1(a).

⁷³ See, e.g., Decision 16-06-021, 2016 Cal. PUC LEXIS 317, *15; D.12-09-018, 2012 Cal. PUC LEXIS 408, *2; D.94-01-040, 1994 Cal. PUC LEXIS 76, *28; 53 CPUC2d 63.

⁷⁴ The Commission in adopting D.14-11-040 gave significant weight to the broad range of represented settling parties, recognizing several times within the decision the importance of TURN and ORA as settling parties.

⁷⁵ Rule 8.

parties pursue a settlement or not.⁷⁶ The Legislature required and the Commission adopted these rules to ensure that parties to proceedings have sufficient information to make informed decisions as to their positions for both litigation and possible settlement negotiation. These rules are intended to prevent any one party from having an unfair advantage into the insight of the decision makers to the exclusion of other parties.⁷⁷

Despite the Utilities' assertion that the Agreement remains reasonable regardless of Edison's failure to comply with the Commission rules, the Commission now has to consider more than what the record reflected at the time it adopted D.14-11-040.⁷⁸ Because of the substantive and specific nature of the *ex parte* between Edison and then President Peevey (a decision-maker), Edison's failure to provide timely notification of the *ex parte* communications affected the proceeding litigation, and review of the Settlement.

5. Discussion

In D.15-12-016 the Commission penalized Edison \$16,740,000; the Commission found Edison engaged in eight unreported *ex parte* communications between one or more Edison executives and one or more Commissioners in violation of Rule 8.4. The Commission also found that Edison violated Rule 1.1 as a result of a series of grossly negligent acts and omissions in disregard of the

⁷⁶ Id.

⁷⁷ Utilities must consent to settlements as certain Constitutional protections are accorded utilities in ratemaking proceedings. *Chicago, Milwaukee & St. Paul v. Minnesota*, 134 U.S. 418; *Smyth v. Ames* 169 U.S. 466; *Stone v. Farmers Loan & Trust* 116 U.S. 307.

⁷⁸ Rule 16.4 Petition for Modification states under subsection (b) "Any factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration or affidavit." In this case the parties have sufficiently alleged facts that must be considered. We seriously doubt the Utilities could successfully challenge these facts given the findings in D.15-12-01606 sanctioning Edison for the very same violations that are raised here as the "new or changed facts" at issue.

Commission's *ex parte* Rules, and by providing the false and misleading statements made by Mr. Litzinger under oath during the May 14, 2014 hearings. Additional violations of Rule 1.1 include Edison's limited inquiry into the true nature of the "Poland Meeting", as well as its failure to provide copies of the written communications associated with that meeting (the Bristol Notes). This Ruling does not reopen or reexamine the violations found or the penalty issued against Edison in D.15-12-016. It does, however, rely on the findings and conclusions of D.15-12-016.

As a result of these findings, as well as the PFMs filed by A4NR and ORA, the Assigned Commissioner and Assigned Administrative Law Judge issued the May 9th Ruling reopening the record and directing the parties to file briefs assessing whether the Agreement adopted in D.14-11-040 meets the Commission's standard for approving such agreements as set forth in Rule 12.1(d) in light of D.15-12-016. Parties briefed the issue, this Ruling addresses how to proceed with an assessment of the impact of these communications on the settlement negotiation process and, in turn, the impact of that process on the Agreement adopted in D.14-11-040.

Edison's failure to disclose *ex parte* contacts and the false and misleading statements made under oath to the Commission may have materially impacted the parties' litigation and negotiation positions. The "Poland Meeting" *ex parte* occurred on March 26, 2013, prior to the Phase I and Phase II evidentiary hearings and well before the settlement negotiations. TURN and ORA argue their litigation and negotiation positions would have been different with knowledge of the *ex parte* contacts.⁷⁹ A4NR asserts its position and strategy

⁷⁹ TURN Opening Brief July 7, 2016 at 7; TURN Reply Brief July 21, 2016 at 4; ORA Opening Brief July 7, 2016 at 4-9; ORA Reply Brief July 21, 2016 at 2; A4NR Reply Brief July 21, 2016 at 15.

would have been altered with full knowledge of Edison's unnoticed *ex parte* communications.⁸⁰ If the other Commissioners had known about the *ex parte* communications and had Edison's witnesses not provided false and misleading statements under oath, the Commission would have had the opportunity to seek further information from the parties, reevaluate the Agreement, hold additional hearings, or even potentially return to litigation of Phase 3 in the proceeding.⁸¹

The Commission penalized Edison for failure to timely file notification of *ex parte* contacts, including the Bristol Notes, and for providing false and misleading statements to the Commission. Issuance of a penalty, however, does not mean Edison's actions did not have other consequences that impact ratepayers.⁸² The PFM raise this point explicitly. The Commission has an

⁸⁰ A4NR Petition for Modification April 27, 2015 at 3-6.

⁸¹ See Reporter's Transcript Oral Argument Investigation 12-10-013, October 31, 2014, Vol. 16 at 2849-2857. Also see concurrence of Commissioner Sandoval to D.15-12-016. The transcripts indicate that both Commissioner Sandoval and Commissioner Peterman raised questions and sought assurance that the process was fair and transparent. Commissioner Sandoval specifically states at 2857:4-16:

...I think it's important as we talk about a process that is transparent, that settlement, while it is also a process in which we do not participate, it is transparent in the sense that the process is set out, and we need to make sure that the process is followed. And then our job is to consider the factors and go through this part of the process to determine whether or not the settlement is appropriate in light of those factors or whether we should reject the settlement and continue on with the process.

⁸² As stated in D.15-12-016 we remind all parties that the Commission considers any *ex parte* violation to be harmful to our agency and its process.

In the current context, the disclosure of many little comments which sometimes touched on a substantive issue seems nominal to SCE. But this view undervalues the importance of transparency and disclosure of those individual contacts with decision makers at the Commission.

SCE's violations, particularly not reporting the Poland meeting, meant that other parties lacked the knowledge, however logical, that former President Peevey and some at SCE had begun to consider permanent shutdown and what costs might be allocated by a settlement. Additionally, all parties other than SCE were in the dark about former President Peevey's repeated attempts to obtain SCE's support (inside or outside the settlement) for a variously described data center or GHG

obligation to reconsider whether the Agreement adopted in D.14-11-040 remains reasonable in light of Edison's violations.

ORA, TURN, A4NR, WEM, and Henricks all assert the unreported *ex parte* communications adversely impacted the parties' litigation and negotiation positions. The extent of this impact cannot be assessed based solely on the assertions of the parties. For example, TURN and ORA acknowledge the Agreement provides significant benefits to ratepayers beyond the provisions set out in the Bristol Notes. At the same time, however, they argue that the Commission should reject the adopted Agreement despite these benefits.

A4NR argues that the Bristol Notes can be interpreted to represent a greater benefit to ratepayers than D.14-11-040 in the range of \$919 million to \$1.522 billion.⁸³ In its Opening Brief, A4NR characterizes this amount as \$1.4 billion.⁸⁴

Henricks argues that the Agreement should not have been adopted to begin with and that the Commission must conduct an evidentiary hearing on the reasonableness of Edison's actions, particularly in light of the unnoticed *ex parte* communications. Henricks argues the only way the Commission can meet its obligation of ensuring just and reasonable rates is to hold hearings, receive

research program at UCLA. Notably, there was little comment from parties about the competitive final GHG research, development, and deployment program included in the amended settlement agreement.

D.15-12-016 at 40-41. Citing to D.14-11-040 at 40 (A4NR expressed "disappointment" with the "timid consideration of the shutdown's impact on CO2 emissions and electricity Prices." [citation omitted])

⁸³ See Letter from John Geesman, Attorney for Alliance for Nuclear Responsibility, dated April 13, 2015, Attachment 4 to A4NR Petition for Modification dated April 27, 2015.

⁸⁴ A4NR Opening Brief, at 7.

evidence, and make findings of fact and conclusions of law therefore the proceeding should be reopened to litigate Phase 3.⁸⁵

In addition, ORA, TURN, A4NR, WEM, CDSO, and Henricks all assert that knowledge of the *ex parte* communications would have altered and informed their positions during the negotiation and litigation process. A4NR, TURN, WEM, CDSO, and Henricks recommend the Commission reopen the proceeding and hold hearings on Phase 3 issues.

The settlement process is designed to allow for free discussion among the parties. Such discussions are confidential and the Commission cannot substitute its judgment for that of the parties as to the give and take during confidential negotiations.⁸⁶ What is important, as noted by TURN, is that any settlement proposed to the Commission be the result of a “good faith negotiation process.”⁸⁷ Here the unreported *ex parte* communications created information asymmetry that could directly benefit Edison and its shareholders. That combined with the renouncing of the Agreement by both TURN and ORA leave serious doubt as to whether the Agreement resulted from a good faith negotiation process.

The Commission must ensure the integrity of its processes and ensure that its decisions serve the public interest. The Agreement was adopted by the

⁸⁵ See Henricks Brief in Response to May 9th Ruling dated July 7 at 29 and throughout (*passim*).

⁸⁶ Although the Commission cannot insert itself into the confidential negotiation process that occurs among the parties it does have an obligation to independently determine whether any proposed settlement is reasonable in light of the whole record, consistent with the law, and in the public interest prior to adoption of any proposed settlement. If the Commission does not make these findings it may also reject the proposed settlement. In rejecting a proposed settlement, the Commission may choose to 1) hold hearings on the underlying issues in which case the parties to the settlement may either withdraw the settlement or offer it as joint testimony; 2) allow the parties time to renegotiate the settlement, or 3) propose alternative terms to the parties to the settlement which are acceptable to the Commission and allow the parties reasonable time within which to elect to accept such terms or to request other relief. See Rule 12; Also see Rejection of Settlement Rule 12.4.

⁸⁷ TURN Reply Brief July 21, 2016 at 1.

Commission and implemented two years ago. Ratepayers received, and continue to receive, economic benefits from the Agreement. The Commission cannot simply unwind the Agreement without assessing the harm such action could cause ratepayers. Instead, the Commission must examine the situation as it is today, balancing (a) the potential harm to ratepayers in adoption of the Agreement without the knowledge of the *ex parte* communications that could have improved the position of ratepayers' advocates, and (b) the potential harm to ratepayers of disrupting implementation of an Agreement that is providing ongoing benefits to ratepayers. Modifications to D.14-11-040 may be able to address any disadvantages suffered by ratepayers as a result of Edison's actions, but it is paramount that any future action does not impair ratepayers' current position.

We cannot go back in time and reconstruct the parties' strategic thought process, nor can we predict what changes or outcomes would occur from future litigation. What we do know is Edison had an obligation to inform the parties of the *ex parte* communications within three days of occurrence and failed to do so for almost two years. This left other parties deprived of information at a critical point in the proceeding. This informational inequality disadvantaged ratepayer advocates in negotiation and assessment of litigation options, which in turn, harmed ratepayers.

The Commission's rules require a level playing field by mandating *ex parte* disclosures for ratesetting proceedings such as the SONGS OII. The Commission has adopted rules to evaluate settlements. The Commission also has an independent obligation to ensure that all settlements meet the requirements of Rule 12.1(d). Settlements therefore must result from good faith negotiations. Here Edison did not comply with the rules; through its engagement in multiple unreported *ex parte* communications, Edison tipped the balance of negotiations in

its favor and in the favor of its shareholders. The information gained by Edison during these unreported *ex parte* communications provided the Utilities an unfair advantage. The advantage Edison gained by the information asymmetry included direct insight into what at least one decision-maker would accept as a settlement, and the fact that this decision maker preferred parties settle rather than litigate.⁸⁸ This information could have provided additional leverage to ratepayer advocates in the negotiation process⁸⁹ resulting in additional benefits to ratepayers.⁹⁰

The content of the Bristol Notes, and the failure of Edison to properly disclose the oral and written *ex parte* communications memorialized by the Bristol Notes, constitute what the Commission has previously characterized as “new facts or circumstances which create a strong expectation that we would have made a different decision in a prior order.”⁹¹ The situation we are left with raises serious questions as to whether the Agreement remains in the public interest. However, before issuing a decision on the pending PFMs, the Commission must fully consider all impacts to ratepayers given the circumstances today.

The Agreement was implemented over two years ago. Ratepayers have received significant benefits (both credits and refunds) through a series of complex calculations that span more than one proceeding as a result of the

⁸⁸ ORA Opening Brief July 7, 2016 at 5, 6, 8; ORA Reply Brief July 21, 2016 at 2; A4NR Opening Brief July 7, 2016 at 7-8; A4NR Reply Brief July 21, 2016, Section II(A); TURN Opening Brief July 7, 2016 at 7; TURN Reply Brief July 21, 2016 at 4.

⁸⁹ According to Black's Law Dictionary, one meaning of material is “of such a nature that knowledge of the item would affect a person's decision-making process.” Another meaning of material is “significant,” in other words “important enough to merit attention.” Feb 26, 2007.

⁹⁰ TURN Opening Brief July 7, 2016 at 7.

⁹¹ A4NR Petition for Modification April 27, 2015 at 1.

Agreement. Ratepayers should not be further disadvantaged as a result of Edison's bad acts. Litigating Phase 3, as if the Agreement had never been adopted, may further harm ratepayers. Reopening litigation will create additional costs to ratepayers in time, expense, resources, and uncertainty.⁹² The benchmark today for assessing the reasonableness of any proposed settlement is not the parties' former litigation positions; the benchmark today is the Agreement as implemented and quantification of the loss suffered by ratepayers as a result of Edison's unlawful actions. We therefore require more information from the parties prior to issuance of a decision on the pending PFMs.

The parties have widely different positions on the material disadvantage attributable to Edison's actions:

- ORA argues Edison's violations cost ratepayers \$383 million for its lost litigation position and an additional \$25 million for the contribution to the University of California.
- TURN does not specifically quantify the harm caused by Edison's violations, but recommends that the Commission litigate Phase 3 or modify the settlement in a way that would provide significant additional credits or refunds to ratepayers, as well as disallow recovery for some or all of \$2.17 billion in base plant.
- A4NR claims the Bristol Notes framework would have increased ratepayer credits and refunds by \$919 million to \$1.4 billion.⁹³ A4NR suggests resumption of litigation including consideration of the now withdrawn Phase 1 Proposed Decision, issuance of a Phase 2 Proposed Decision and commencement of evidentiary hearings for Phase 3.

⁹² *Energy Alternatives vs. Pacific Gas and Electric Company*, D.93-02-011, 1993 Cal. PUC LEXIS 62, at 6.

⁹³ A4NR Petition for Modification dated April 27, 2015, Appendix A, Declaration of John Geesman at 2; also see Attachment 4 Letter from John Geesman, Attorney for Alliance for Nuclear Responsibility, dated April 13, 2005.

We agree with ORA that Edison “through its *ex parte* contacts had undisclosed insights regarding what Commission decision makers believed regarding the instant proceeding” and that “this is a great asset in assessing litigation risk, which in turn impacts bargaining.”⁹⁴

In considering the pending PFM and the additional record developed in response to the May 9th Ruling, we are presented with a set of unique circumstances that requires the Commission to craft an appropriate remedy consistent with the issues presented. Where a party fails to disclose material information the Commission has the ability to create appropriate remedies.

We shall leave to a case by case development the formulation of remedies appropriate to the multiple circumstances in which access to material information has been denied or manipulated. Our jurisdiction in this matter is premised upon the expenditure of ratepayer dollars by entities subjected to our regulatory authority. Any breach of the duty to disclose material information threatens ratepayer interests by corrupting the integrity of the market mechanisms upon which they are ultimately reliant for the distribution of goods or services.⁹⁵

Further, the Commission may reopen a settlement that it has approved in the past where “extraordinary circumstances” surround adoption of the original settlement.⁹⁶ In *Golconda Utilities Co.*, at 305, the Commission stated that where

⁹⁵ *Energy Alternatives vs. Pacific Gas and Electric Company*, D.93-02-011, 1993 Cal. PUC LEXIS 62, at*17.

⁹⁶ In *Golconda Utilities Co.*, 68 CPUC 296, 305 (1968), the Commission stated:

We construe Section 1708 as authorizing the Commission to rescind, alter or amend decisions with respect to its prospective regulatory jurisdiction. (*California Manufacturers Assn.*, 54 Cal. P.U.C. 189; *Panhandle Eastern Pipe L. Co. v. Federal Power Com'n.*, 236 F.2d 289, 292; *Certiorari denied*, 335 U.S. 854.) Where jurisdiction has been reserved a point may be reopened or considered at a later time. (*Investigation of Miraflores Water Co.*, *supra*; [60 CPUC 462, 468 (1963)]; *United States v. Rock Island Co.*, 340 U.S. 419, 434.)

there is extrinsic fraud or other extraordinary circumstances the Commission can re-adjudicate the same transaction differently with the same parties. In this instance, for purposes of this Ruling, we need not reach the issue of whether there was “extrinsic fraud” because there clearly were “extraordinary circumstances” present in Edison’s failure to disclose the *ex parte* communications prior to Commission adoption of the Agreement.

In considering the most appropriate remedy in this case, we cannot ignore the fact that ratepayers have already received credits and refunds as a result of the implementation of the Settlement. We also do not want to affirm a result that rewards the Utilities for violations that undermine the integrity of the Commission process.

Any remedy applied here must carefully reflect the impact to ratepayers, as ratepayers cannot be further disadvantaged as a result of Edison’s actions. The Commission must determine whether D.14-11-040 remains reasonable in light of Rule 12.1(d). If not, the Commission must quantify the loss of a stronger negotiating position caused by Edison’s unlawful actions balanced with the benefits of the Settlement.⁹⁷ The parties are in the best position to address the value of the disadvantage to ratepayers created by Edison’s violations.

The parties are directed to meet and confer to determine whether there is potential for agreement on modifications to D.14-11-040. During the meet and

Here, the Commission retains jurisdiction because the decision approving the Agreement is subject to pending applications for rehearing. Further, (*Golconda Utilities Co.*, *supra*, 68 CPUC at 305, citing *United States v. Seatrains Lines*, 329 U.S. 424; *Pacific Telephone & Co. v. Public Utilities Com.*, 62 Cal. 2d 634; cf., *Prudence Corp. v. Feris*, 323 U.S. 650; *Strickland Transportation Co. v. United States*, 274 F. Supp. 921, *affd.*, 19L19 L. Ed. 2d 782; Treatise on Administrative Law, Davis, p. 559.) See D.98-07-031, 1998 Cal. PUC LEXIS 355, *14-15; 81 CPUC2d 63, *reh’g denied*, D.99-01-033, 1999 Cal. PUC LEXIS 136; 84 CPUC2d 707.

⁹⁷ See D.08-09-038.

confer sessions, we encourage the parties to carefully consider the modifications proposed by the parties in their briefs responding to the May 9th Ruling.

- ORA recommends an additional refund to ratepayers in the amount of \$383 million as compensation for the loss of its litigation position and an additional credit of \$25 million in lieu of the contribution to the UCLA for the GHG research and reduction program.
- TURN in its opening brief proposed modifications including: 1) disallowance or recovery for some or all of the \$2.17 billion in base plant; 2) refund RSG costs collected from ratepayers in 2010 and 2011; 3) elimination of any return on debt or preferred stock for base plant; 4) additional refunds in the amount of \$86.95 million consistent with what would have been ordered in the Phase 1 Proposed Decision; and 5) elimination of the GHG research contribution and credit this amount to ratepayers.⁹⁸
- A4NR set forth its analysis of the difference between the valuation of the Bristol Notes and the Agreement as adopted in D.14-11-040.⁹⁹ A4NR's analysis found the framework set out in the Bristol Notes to favor ratepayers in the range of \$919 million to \$1.522 billion over the adopted Agreement. This number was updated in A4NR's Opening Brief as \$1.4 billion. A4NR's analysis sets forth a number of provisions in the Agreement that could be adjusted to offset any loss to ratepayers from Edison's rule violations.
- Additional items to consider include possible reconfiguration of the potential MHI arbitration award to allow further ratepayer benefits as an offset for any tipping of the balance in the Utilities' favor that resulted from the unreported *ex parte* communications.

⁹⁸ The parties should specifically address any issues pertaining to GHG emissions resulting from the closing of SONGS, potential benefits of the research program, and whether these issues are being addressed in other proceedings. In addressing these issues the parties should also provide further comment on the disposition of SDG&E AL-2919-E and SCE AL 3403-E.

⁹⁹ See Attachment 4 to Declaration of John Geesman attached to A4NR PFM, Letter dated April 13, 2015 from John Geesman, Attorney for A4NR to Ms. Sue Kately, Chief Consultant Assembly Utilities and Commerce Committee

6. Schedule/Procedural Next Steps

The parties are directed to meet and confer to determine whether there is potential for pursuing jointly proposed modifications to D.14-11-040. We encourage the parties to carefully consider the modifications proposed by TURN, ORA, and the assessment of the Bristol Notes by A4NR. As indicated in the May 9th Ruling, the parties should also carefully consider whether the \$25 million GHG Research and Reduction Program remains in the public interest in light of the additional late filed *ex parte* after the issuance of D.15-12-016. The parties should carefully consider whether and to what extent any modifications to D.14-11-040 could allow further ratepayer benefits as an offset for any tipping of the balance in the Utilities' favor that resulted from the unreported *ex parte* communications.

All parties have the opportunity to participate in settlement discussions concerning the PFMs. The Utilities will host at least two meet and confer sessions held in accordance with Rule 12.6. The Utilities will invite all parties to discuss potential modifications to D.14-11-040 consistent with the schedule provided below.¹⁰⁰ The Utilities will file and serve the notices to the complete service list and provide at least 7-day notice for each of the all-party meet and confer sessions. We encourage all parties to attend the sessions. If a number of parties representing a broad range of interests reach an agreement, these settling parties shall file a joint PFM¹⁰¹ setting forth their proposed revisions to

¹⁰⁰ The meet and confer sessions ordered herein shall be limited to parties, and shall be confidential subject to the Commission Rules.

¹⁰¹ The Legislature recently adopted Senate Bill (SB) 215, which was signed by the Governor and filed with the Secretary of State of September 29, 2016, effective January 1, 2017. SB 215 amends PU Code § 1701.1 to add the following language at 1701.1 (e)(6):

If an *ex parte* communication is not disclosed as required by this subdivision until after the commission has issued a decision on the matter to which the communication pertained, a party not participating in the communication may

D.14-11-040 consistent with the procedures set forth in Rule 12 for proposing a settlement and Rule 16.4 for Petitions for Modification. If the parties (or a sub-set of the parties representing a broad range of interests) cannot reach agreement by April 28, 2017, then the parties shall file and serve a summary of their individual positions consistent with the schedule set forth below. These summaries should include any updates to the proceeding record that the Commission should have in light of the May 9th Ruling as the Commission considers the pending petitions for modification.

If parties (or a sub-set of parties representing a broad range of interests) cannot by April 28, 2017, reach an agreement on modifications to D.14-11-040, the Commission will carefully consider all of its options in ruling on the pending petitions for modification. These options include, but are not limited to, entertaining additional written testimony, holding evidentiary hearings, and supplemental briefing in this proceeding.¹⁰²

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file a petition to rescind or modify the decision. The party may seek a finding that the ex parte communications significantly influenced the decision's process or outcome as part of any petition to rescind or modify the decision. The commission shall process the petition in accordance with the commission's procedures for petitions for modification and shall issue a decision on the petition no later than 180 days after the filing of the petition.

¹⁰² The Assigned Commissioner and Administrative Law Judge may require additional hearings for any PFM that proposes revision to the settlement adopted in D.14-11-040 consistent with Rule 12, particularly where any party contests such settlement.

EVENT	DATE
Edison to file and serve notice to all parties of a meet and confer to discuss modifications to Settlement adopted in D.14-11-040. Edison is to provide at least 7-days' notice to all parties.	On or before January 10, 2017
First meet and confer inviting all parties to discuss modifications to Settlement adopted in D.14-11-040.	No later than January 31, 2017
Edison to file and serve notice to all parties of second meet and confer to discuss modifications to Settlement adopted in D.14-11-040. Edison to provide at least 7-days' notice to all parties.	No later than February 28, 2017
If the parties or a sub-set of the parties representing a broad range of interests reach agreement on a Joint Petition for Modification these parties are to file and serve notice for conference consistent with Rule 12.1(b).	Conference must convene no later than March 27, 2017
<p>Parties to file results of meet and confer sessions:</p> <p>* If the parties or a subset of parties representing a broad range of interests can reach agreement they are to file a Joint PFM to D.14-11-040.</p> <p>* If the parties or a subset of the parties representing a broad range of interests cannot reach a joint proposed PFM for submission, the parties are to file a joint status conference statement with further procedural recommendations and a proposed schedule.</p>	No later than April 28, 2017
Utilities to file and serve a status report within 7 days of each meet and confer session, and any settlement conference that may be held as directed above. The status report is to confirm that the meet and confer sessions were held and who attended the session. The status report shall not include any information deemed confidential pursuant to Rule 12.6.	

7. Ex Parte Ban

Any and all *ex parte* communications with any decision maker or Commissioner advisors regarding all issues in this proceeding continue to be prohibited. Further, all communications with any Commissioner or Commissioner advisors regarding procedural matters also continue to be prohibited. Questions or clarifications from parties regarding procedural matters shall be communicated to the assigned ALJ by email and the party sending the email communication shall copy all parties listed on the proceeding service list.

Therefore, **IT IS RULED** that:

1. Parties to the Settlement Agreement remain relieved of their obligations to comply with sections 5.1 and 5.8 of the Settlement Agreement during the pendency of this reopened proceeding.

2. Southern California Edison Company and San Diego Gas & Electric Company shall notice at least two meet and confer sessions inviting all parties to discuss potential further procedural actions, and whether a broad range of parties can reach agreement on proposed modifications to D.14-11-040 consistent with the schedule set forth above. The substance of the discussions for the meet and confer sessions shall be confidential consistent with Rule 12.6.

3. The Utilities shall within 7 days of each meet and confer file a notice with the Commission confirming that the meet and confer was held and listing which parties attended.

4. The parties or any sub-set of parties that intend to propose modifications to D.14-11-040 shall follow the process set forth in Rule 12¹⁰³ and

¹⁰³ The parties will comply with Rule 16.4 and utilize Rule 12 as procedural guidance for any request to modify D.14-11-040 through a Joint PFM that may be filed as a result of discussions.

Rule 16.4 for adoption of settlements and file a joint motion with the proposed modifications consistent with the schedule set forth above.

5. If no proposed modifications are filed and served, the parties shall file and serve a joint status conference statement setting forth further procedural and substantive recommendations of the parties for determination of the pending petitions for modification of D.14-11-040 consistent with the schedule set forth above.

6. The prohibition on *ex parte* contacts shall remain in effect consistent with the May 9, 2016 Joint Ruling.

7. All procedural questions shall be sent by email to the assigned ALJ, and all parties listed on the proceeding service list will be copied on any such emails.

Dated **December 13, 2016**, at San Francisco, California.

/s/ Catherine J.K. Sandoval

Catherine J.K. Sandoval
Assigned Commissioner

/s/ Darcie L. Houck

Darcie L. Houck
Administrative Law Judge

ATTACHMENT A



HOTEL BRISTOL
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Warsaw

1. Pre-RSG investment: recover w/ debt-level return through 2022.
2. RSG and post-RSG investment: disallow "retroactively out of rate base" effective 2/1/2012 ~~2/1/2012~~
3. Replacement power responsibility: customer
4. NEIL/insurance recoveries: to customers
5. MHI recovery: 1st to SCE to the extent of the disallowance
2^d to customers
6. Decommissioning costs: remain in rates through time of decommissioning -- periodic redetermination in CPUC proceedings as before
7. O&M:
 - a) Already approved GRC amounts through shutdown + 6 months
 - b) OII to determine shutdown O&M through end of 2017 (i.e., not in GRC)
 - c) shutdown O&M 2018 and beyond determined in GRC's
 - d) Shutdown O&M to include reasonable severance for SONGS employees - Approx

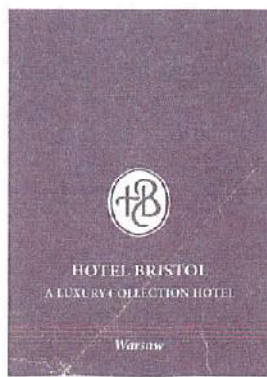
of \$50 million

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8. Environmental offset: SCE to donate ¹⁰ \$5.0 million per year 2014-2022 to _____ { as agreed upon GHG, climate, or environmental academic research fund, institution, etc. }

9. Process
- a) settlement agreement approved in OII
 - b) balance of OII closed except for shutdown O&M phase
 - c) new OII phase for shutdown O&M per 7(b) and 7(d) above
 - d) 2018 GRC for shutdown O&M 2018 and beyond
 - e) Usual CPUC proceedings for review of decommissioning costs

MHI Recovery

- 1 - First \$200 million — 50% costs, 50% SCE
- 2 - Next \$200 million — 70% costs, 30% SCE
- 3 - Any above \$400 million up to disallowance — 80% costs, 20% to SCE
- 4 - Above disallowance — 25% SCE, 75% costs

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